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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. .....

UNITED STATES OF AMERICA FOR
MILLER EQUIPMENT COMPANY,
Plaintiff

versus

COLONIAL STEEL AND IRON COMPANY, INC.
TROITINO AND BROWN, INC., TRAVELERS
INDEMNITY COMPANY, HARTFORD,
CONNECTICUT AND U. S. ARMY CORPS OF
ENGINEERS,
Defendants

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
PETITION BY COLONIAL STEEL AND IRON COMPANY, INC., TROITINO AND BROWN, INC. TRAVELERS INDEMNITY COMPANY, HARTFORD, CONNECTICUT

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 383 Federal Reporter 2d. Series, 669 (1967).

GROUNDS OF JURISDICTION OF THIS COURT:

This case was decided by the Court of Appeals for the Fourth Circuit and Judgment filed July 20, 1967. Petition for rehearing en banc was denied by Order filed October 18, 1967. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under Title 28 U. S. C., §1254 (1).

II

QUESTIONS PRESENTED:

This was a case brought by the plaintiff against the defendants to recover the alleged balance due on the purchase price of materials furnished in the construction of a bridge on Virginia Highway No. 614, and plaintiff contends that the United States District Court for the Middle District of North Carolina had jurisdiction over the action under the provisions of the Miller Act, 49 Stat. 793 (1935) 40 U. S. C. §270(a) - 270(d) (1964). The questions presented for review are:

(1) Did the United States District Court have jurisdiction over this action?

(2) Did the Circuit Court of Appeals commit error in its judgment:

(a) In that it reversed the findings of fact made by the District Judge, which were amply supported by the evidence?

(b) In directing a final judgment for the plaintiff without a determination of the offsets claimed by the defendants.

STATUTORY PROVISION:

Title 40, U. S. Code, §270b. Bonds of contractors for public buildings or works; rights of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or per-

formed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorizd by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

STATEMENT OF THE CASE:

This is a civil action brought in the United States District Court for the Middle District of North Carolina, purportedly under the provisions of the Miller Act, 49 Stat. 793 (1935) 40 U. S. C. §270a - 270d (1964). The use plaintiff, Miller Equipment Company (Miller) sued the defendants, Colonial Steel & Iron Company (Colonial), Troitino and Brown, Inc. (Troitino), and Travelers Indemnity Company (Travelers), to recover the alleged unpaid balance of amounts due Miller. Under a contract as finally reduced to writing, dated August 23, 1963, Miller was to fabricate certain steel work and deliver the smaller items to the bridge site and 15 heavy girders were to be delivered to the railhead nearest the bridge site at Miller's expense for $106,000. Under contract dated January 9, 1964, Miller agreed to deliver the girders from the railhead to the job site for an additional $3,250.

Defendants contended that the action was not properly brought under the Miller Act and that plaintiff breached its contractual obligations and that defendants were entitled to certain offsets on account of Miller's default.

Trial by Jury was waived and the case was heard by the District Judge. The District Judge held that Colonial was not a subcontractor within the meaning of the Miller Act and that the case was not properly brought under the Miller Act. The Court further determined that it had pendent jurisdiction and could settle the non-Miller Act question between the parties. The Court held that Miller had no contractual relationship with Troitino and could not recover against it. The Court further held that Miller had breached its contract with Colonial and that because of certain setoffs

and back charges on account of the breach, that plaintiff could recover nothing of the defendants.

The Court of Appeals reversed the trial court and remanded the action for entry of judgment for the use plaintiff, without determination of the offsets claimed by defendants.

FACTS

On September 4, 1962, Troitino entered into the prime contract with the Engineers to construct a concrete and steel bridge across the Cranes Nest River on State Highway No. 614 in Dickenson County, Virginia, for the basic price of $762,470.15. The contract called for completion of the bridge on or before October 13, 1963, with liquidated damages at $100.00 per day after said date. Time extensions for 333 days were given by the Engineers to Troitino for good cause shown which extended the completion date to September 10, 1964.

Shortly after the execution of the prime contract, Colonial agreed in writing with Troitino to furnish the structural steel for said bridge for $115,000. Colonial was to deliver the steel to the job site and Troitino was to unload the steel at the job site. (M. App. 157)

In the summer of 1963 Colonial negotiated with Miller to supply all of the steel requirements for the bridge except the anchor bolts. At that time Colonial had completed certain shop drawings and had submitted them to the Engineers for approval, as required by the prime contract. Miller made an oral agreement with Colonial and then sought a higher price for its work, which Colonial agreed to, and by letter agreement dated August 23, 1963, Miller agreed to

fabricate the steel for a price of $106,000. Under this agreement Miller was to deliver the 15 girders to the railhead at its expense and Colonial was to deliver the girders from the railhead to the job site, where they were to be unloaded by Troitino. (M. App. 156)

In November 1963, Colonial and Miller had further negotiations and Miller agreed to build a special rig and transport the girders from its plant in Salisbury to the job site for an additional sum of $3250. That agreement was changed and under the contract of January 9, 1964, Miller was to ship three girders by rig from Salisbury to the site and it was to ship the other girders by rail to the rail siding at Freemont and then transport the 12 girders from Freemont to the job site, the loading at the railhead to be done by others. Under this agreement Miller shipped one girder by rig on December 5, 1963, which reached the job site with help from Troitino. A second girders was shipped by rig on or about December 16, 1963, and said girder was abandoned on the road side about 12 miles from the job site. Twelve girders were shipped by rail on January 9th and 14th, arriving at Freemont shortly thereafter, but Miller never sent its special rig to the railhead. Miller shipped the last girder from Salisbury on or about February 27, 1964 and moved said girder to within approximately five miles of the job site where Metler Crane & Erection Service took the girder and delivered it the remainder of the way. (M. App. 155)

On January 30, 1964, Colonial, at Plaintiff's behest, notified Troitino that the steel could not be delivered until the roads to the construction site were repaired and made passable.

On February 13, 1964, Troitino informed Colonial that its need for the steel was such that it would obtain delivery

of the girders by other means, if satisfactory arrangements were not made by February 17. On February 17, Troitino contracted with Metler Crane and Erection Service, Inc. ("Metler") to deliver the girders to the site for $12,000. Metler started moving the girders to the site on February 26th and finished 12 days later. Finally, on February 27th, Miller had its equipment in the area, but Troitino had already contracted with Metler to deliver the girders.

In its opinion the Circuit Court of Appeals for the Fourth Circuit reversed the trial court and said:

"In our view, a total breach of the contract between Colonial and Miller occurred when Colonial, on or about November 25, 1963, directed Miller to remove the girders from the railroad cars. No acceptable excuse or mitigating explanation is offered. Indeed, Colonial admitted in oral argument here that had Colonial then fulfilled its contractual obligation to receive the girders at the rail head there would now be no dispute. The agreements subsequent to Colonial's breach were separate and distinct from the original contract; they were made merely to ease Colonial's difficulty."

The Court further said:

"The action will be remanded for entry by the District Court of a judgment in favor of Miller Equipment Company for the sum of $18,914.46 with interest thereon at the rate of 6% per annum from February 27, 1964 until paid, together with costs. The judgment will lie primarily against Colonial, whose fault it was that occasioned Miller's loss, and secondarily upon Troitino and Travelers for any deficiency."

VIII

ARGUMENT

I

The United States District Court for the Middle District of North Carolina had no jurisdiction over this action.

Jurisdiction of the United States District Court is limited to those cases as provided in the statutory law. The normal procedure is for the plaintiff to set out the grounds for the jurisdiction of the Court in the opening paragraph of the Complaint. This the plaintiff has failed to do, and this defendant contends that a Federal question exists only in the pleader's imagination.

Rule 8 of the Federal Rues of Civil Procedure, title 28 USCA, requires that a pleading which sets forth a claim for relief shall contain a short and plain statement of the grounds upon which the Court's jurisdiction depends. In Paragraph VII of its Complaint, Miller makes a vague reference to the provisions of 40 USC, §270 ff, but no reference is made to the jurisdiction of the Court.

Miller's complaint sought damages for materials supplied for the bridge on Route No. 614, but part of the alleged sum, in the amount of $2,739.46, arose on another job on Route No. 619. No facts were found on this item as to the status of the parties involved or the validity of the claim.

The above code provisions are commonly known as the "Miller Act" and give jurisdiction to the United States District Courts over certain actions arising under said act. Section 270 (a) sets out the requirement of bonds on public works, and §270 (b) sets out the rights of persons furnishing labor or material.

In the present case, plaintiff's rights depend upon the relationship of the parties, particularly the relationship between Troitino and Brown and Colonial Steel. In order to maintain this action, plaintiff must bring itself within one of two classes that are afforded protection under the Miller Act:

(1) A materialman who dealt directly with the prime contractor, or

(2) A materialman, who, lacking express or implied contractual relationship with the prime contractor, has direct contractual relationship with a subcontractor and who gives the statutory 90 days notice of his claim to the prime contractor.

Plaintiff contends that it is entitled to recover as a materialman to a subcontractor. In order to do so, plaintiff must show that Colonial was a subcontractor to Troitino. This the evidence fails to show.

In the leading case of Clifford F. MacEvoy Co. v. U. S. (1944) 322 US 102, 88 LE 1163, 64 S Ct 890, the Court said that it was clear from the legislative history of the act, that Congress intended to attach to the term "subcontractor" the meaning of one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen. Under this definition, applied to the evidence at the trial, Colonial was not a subcontractor.

Five criteria for subcontractors were set out in Potomac Rigging Co. v. Wright Contracting Co., 194 F Supp 444 (DC, Md. 1961) as follows:

(1) The third party was never asked by the prime contractor to furnish a performance bond,

(2) The prime contract provided that subcontractors had to be approved by the Government and the evidence did not show that the Government approved the third party as a subcontractor;

(3) Plaintiff did not perform any work on the job site itself; it merely hauled the materials to the job site;

(4) In Government contracts of this nature, it is generally required that subcontractors must submit periodically certified copies of their payrolls. The third party was never asked to and did not submit any such payroll data to either the prime contractor or Government engineers;

(5) The sales agreement between the third party and the prime contractor was not in the general and customary form of what is understood as a "subcontract".

The agreement between Troitino and Colonial did not meet any of these requirements, and Colonial would, therefore, it contends, not qualify as a subcontractor.

The MacEvoy case, supra, held that a materialman supplying another materialman having a direct contractual relationship with the prime contractor, was not entitled to protection of the act.

Your Petitioner contends that the District Court was correct in its Finding of Fact No. 7: that Colonial was merely a materialman and that Colonial, being only a materialman as distinguished from a subcontractor, Miller is not entitled to maintain this action under the Miller Act. A

judgment to that effect, on a similar set of facts, was rendered by the Court of Appeals for the Fifth Circuit in Aetna Casualty Company vs. United States of America for the use and benefit of Gibson Steel Company, Inc., 382 F 2d 615 (1967).

Even if Colonial be considered a subcontractor, jurisdiction would fail because Miller did not give the notice within ninety (90) days, as required by the Miller Act and suit was not timely filed. In its complaint, Miller alleges that it gave notice to the defendants, Troitino and Brown and Travelers on June 12, 1964 and on June 30, 1964 and that this action was filed on May 28, 1965. In its judgment the Circuit Court of Appeals found that a total breach of contract between Colonial and Miller occurred on or about November 25, 1963 and that agreements subsequent to that date were separate and distinct from the original contract. Under this holding, your Petitioner respectfully contends that it would be necessary for Miller to give notice to Troitino and Travelers within ninety days after November 25, 1963, which was not done.

The Court of Appeals further held in its opinion that the plaintiff was entitled to collect the full amount for which it sued, with interest thereon at the rate of six per cent (6%) per annum from February 27, 1964. This is tantamount to a finding that the plaintiff completed this contract on the 27th day of February, 1964, and this being true, it would be necessary for Miller to give notice to Troitino within ninety (90) days after the 27th day of February, which was not done, and it would be necessary to bring the action within one year after completion of the contract, which was not done.

II

(a) Petitioners contend that the Circuit Court of Appeals committed error in reversing the findings of fact made by the District Judge which were amply supported by the evidence.

The findings of the District Court as they related to the breach of contract which breach the District Court found to be that of Miller rather than that of Colonial were not "clearly erroneous" so as to empower the Fourth Circuit Court of Appeals to reverse the same under Rule 52(a) of the Federal Rules of Civil Procedure. See Jersey Insurance Company of New York vs. Heffron 242 Fed. 136 CCA, SC 1957 at Page 139. "While the Court of Appeals has broader powers in reviewing a District Judge's findings of fact than in reviewing the findings of a jury, United States v. United States Gypsum Co., 333 U. S. 364, 365, 68 S. Ct. 525, 92 L. Ed. 746, it will not disturb his findings merely because it may doubt their correctness. It is required that the Court of Appeals be satisfied that the District Judge is clearly in error before it will set his findings aside. Federal Rules of Civil Procedure, Rule 52 (a), 28 U. S. C." The Circuit Court of Appeals in this case is substituting its interpretation of the facts for that of the District Judge, who had the opportunity to hear all of the evidence and judge the credibility of the witnesses.

The District Court properly concluded that the failure to have the girders at the job site when they were needed by Troitino was the fault of the plaintiff, Miller. The evidence adduced at the trial more than substantiates the District Court's finding. The District Court said "The evidence shows that the weather in the area of the job site was not

unusually severe. The *designated* (emphasis ours) routes to the job were maintained by the Virginia Highway Department, and were kept clear of snow. The Court is of the opinion that Miller could have taken his steerable unit to the rail siding without serious difficulty. This is confirmed somewhat by the fact that on January 10th, 1964 a load of miscellaneous steel was delivered to the job site, and on the return trip, Miller's employee brought back the steerable unit which had been left by the side of the road in December of 1963." (M. Appendix 19 and 20, D. T. Exhibit 3 contained in Supplemental Appendix, T. Appendix 46 and 47).

Miller did not deny in his testimony before the District Court that he by his supplemental contract undertook to deliver the steel to the job site. Miller, however, could not deliver the steel to the job site because he at no time placed equipment and men adequate to move the girders to the job site by Route # 607, the access route specified by the Corps of Engineers (T. App. 14 and 15). Miller, however, knew the access route specified by the Corps and had a copy of specifications showing the access routes. (T. App. 16). Also Miller had sent his men up to the job site between the time he negotiated the verbal supplemental agreement and the time the agreement was confirmed by letter. Miller's men were sent to the job site to find out what route to take to move the material onto the job site. (T. App. 11).

Shortly after January 30th, 1964 Troitino received a letter from Colonial Steel which was written at Miller's behest advising that the girders were designed too long for truck delivery over the routes specified by the Corps of Engineers for delivery and advising that the River Road, the "alternate access" was impassable. (T. App. 47, Exhibit DT 1, M. App. 106).

The District Court therefore properly concluded that Miller was not equipped to do what he had contracted to do and that his failure to take the girders to the job site resulted in damage to Troitino of the $5,400.00 liquidated damages assessed by the Corps of Engineers and of the $12,000.00 which Troitino had to pay Metler to move the steel and of the $7,800.00 which Troitino paid Metler for idle equipment situated at the job site. All of these damages which Troitino suffered were occasioned by Miller's breach of contract.

(*b*) *Petitioners contend that the Circuit Court of Appeals committed error in directing a final Judgment for the plaintiff without a determination of the offsets claimed by defendant.*

The Court of Appeals erred in not remanding the case to the District Court for determination of the offset of $2,739.46 which Troitino back charged Colonial for services paid for by Troitino in getting Miller's equipment out of ditches when Miller was performing work on Route 619.

The District Court did not reach the question of the validity of the offset referred to above since the Court concluded that Miller had breached its contract and was not entitled to recover either from Colonial or Troitino. This offsets was in evidence and the District Court should be allowed to pass on the validity of the same prior to entry of final judgment against Troitino and Colonial. This offset is explained in an agreement which Colonial and Miller entered into on the 28th day of May, 1964. (C. App. 16, D. C.'s Exhibit 1).

To deny the defendants the opportunity of presenting this defense to the District Court deprives these defendants of their right to have all defenses presented and passed on by

the trial court in violation of established cases of the Supreme Court and in violation of the "Due Process" clause of the 14th Amendment. See Mitchell v. Robert DeMario Jewelry, Inc. 361 U. S. 288 L. Ed. 2d 323, 80 S. Ct. 332. Where the District Court granted injunction against further discrimination and ordered reinstatement of wrongfully discharged employees and declined in exercise of discretion to order reimbursement for loss of wages without deciding whether it had jurisdiction under Fair Labor Standards Act to order such reimbursement, and the Court of Appeals did not reach question of abuse of discretion but decided that District Court lacked jurisdiction to order reimbursement and the Supreme Court decided that District Court did have jurisdiction to order reimbursement, case would be remanded to Court of Appeals for consideration of issues of abuse of discretion in declining to order reimbursement, inasmuch as entire record was not before Supreme Court.

See also Hunter vs. Scruggs Drug Store CCA 4, 1940, 113 Fed 2d 971 where record did not reveal whether new soda fountain and carbonator installed in drug store were incorporated as part of fixtures and equipment which was subject to chattel mortgage under doctrine of accession would not be considered by Court of Appeals but case would be remanded to District Court for determination of such question.

For the reasons set out above, Petitioner respectfully moves that this Court issue this Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to

review the decision, judgment and order of the Court of Appeals, in view of the uncertainty of the law under the Miller Act and the fact that the different Circuit Courts of Appeal have reached opposite conclusions.

Respectfully submittted,

NELSON WOODSON
MAX BUSBY
201 W. Council Street
Salisbury, North Carolina
Counsel for Petitioner
Colonial Steel and Iron Company

E. GLENN KELLY
HAROLD K. BENNETT
Suite 410 Gennett Building
Asheville, North Carolina
Counsel for Petitioners
Troitino & Brown, Inc. and
Travelers Indemnity Company

APPENDIX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

GORDON, *District Judge*

This action was brought by the United States of America for the use of Miller Equipment Company against Colonial Steel and Iron Company, Troitino and Brown, Inc., and Travelers Indemnity Company to recover on a payment bond the balance of the purchase price of materials furnished in the construction of a bridge on Virginia Highway No. 614 under the provisions of the Miller Act, 40 U.S.C.A. § 270a-§ 270d.

A jury trial was waived, and the matter was heard by the Court sitting without a jury. At the conclusion of the evidence for the plaintiff and at the end of all the evidence, the defendants moved to dismiss. The Court reserved its ruling on these motions until the Court filed its Findings of Fact and Conclusions of Law.

Having now carefully considered all of counsels' proposals, arguments and contentions, as well as the testimony, pleadings, stipulations, briefs and exhibits submitted, and the reasonable inferences to be drawn therefrom, the Court pursuant to Rule 52 of the Federal Rules of Civil Procedure makes its Findings of Fact and conclusions of Law.

Findings of Fact

1. This action is brought under the provisions of the Miller Act, 40 U.S.C.A. § 270a-§ 270d. Miller Equipment Company, hereinafter referred to as Miller; Colonial Steel

and Iron Company, hereinafter referred to as Colonial; and Troitino and Brown, Inc., hereinafter referred to as Troitino, are incorporated under the laws of and carry on business in the State of North Carolina. Travelers Indemnity Company is incorporated under the laws of the State of Connecticut and is engaged in the business of writing contractors' performance bonds in the State of North Carolina. By order of the Court on July 21, 1965, the United States Corps of Engineers, hereinafter referred to as Engineers, was dismissed as a party to this action.

2. On September 4, 1962, Troitino entered into a contract, hereinafter referred to as the prime contract, with the Engineers by the terms of which Troitino was to construct a concrete and steel bridge on Virginia Highway No. 614 across the Cranesnest River in Dickenson County, Virginia, for the basic price of $762,470.15. The bridge, hereinafter referred to as project 614, was to be completed on or before October 13, 1963, but time extensions for 333 days given by the Engineers, for good cause shown, extended the completion date to September 10, 1964.

3. On September 4, 1962, in accordance with the provisions of 40 U.S.C.A. § 270a and § 270b, Travelers Indemnity Company executed a payment and performance bond by the terms of which Travelers Indemnity Company agreed to make prompt payment to all persons supplying labor and materials in the prosecution of the work on project 614 if Troitino failed to make the payments.

4. Item 20 of the prime contract concerned the supply and erection of all the structural steel to be used in project 614. Approximately 420 tons of steel were required for the bridge and consisted of fifteen girders, beams, braces, struts, bearings, bearing assemblies, bolts and several hundred other

necessary steel pieces. On September 11, 1962, Troitino entered into a sales contract with Colonial which contract confirmed a prior oral agreement under which Colonial was to supply the necessary structural steel for project 614 for the price of $115,000.00. The terms of the contract also required Colonial to deliver the structural steel to the job site of project 614 on or before July 15, 1963. Troitino agreed to unload the steel at the job site. The prime contract designated Virginia State Secondary Routes 607, 617 and 614 as the access routes to the job site, and Colonial was informed of this, as well as the fact that Virginia State Secondary Route 693 had been abandoned by the Virginia Department of Highways. Colonial also was aware of the fact that the fifteen girders required for project 614 would be approximately 110 feet in length and weigh approximately seventeen to twenty tons a piece, and that at least a fifty ton crane would be required in the delivery of the girders to the job site.

5. Troitino let four subcontracts in connection with the work on project 614. These four subcontracts were as follows: subcontract let to Robert N. Green on July 15, 1964; subcontract let to Troitino Brothers, Inc., on September 14, 1962; subcontract let to C. P. Buckner Steel Erection Service on September 26, 1962; and subcontract let to Metler Crane and Erection Service on August 19, 1963. These subcontracts were executed on forms approved by the Engineers and submitted and approved by the Engineers. The prime contract in paragraph GC-6, Subcontractor, required that each subcontract contain Clause 21, a clause providing for Nondiscrimination in Employment, and further required all subcontracts to contain all clauses in Standard Form 19-A. Each subcontract herein referred to contained a requirement that the subcontractor reimburse Troitino a propor-

tionate part of the premium for the payment and performance bond executed by Travelers Indemnity.

6. The sales contract between Colonial and Troitino, referred to in Paragraph Four, was neither submitted to nor approved by the Engineers. The contract was neither executed on forms approved by the Engineers nor did it contain Clause 21 or the clauses in Standard Form 19-A as required by the prime contract. The sale contract did not contain any provision for reimbursement by Colonial to Troitino of a porportionate part of the premium for the payment and performance bond executed by Travelers Indemnity Company, and Colonial was never required to contribute any amount toward the premium.

7. Under the provisions of the prime contract, Colonial was required to submit shop drawings of the fabrication of the structural steel to the Engineers for approval, which were submitted on August 13, 1963. The shop drawings which Colonial made were merely more elaborate drawings of those already made by the Chief Engineer of project 614. The purpose of the shop drawings was to make the engineering drawings readily understandable to the shop personnel of Colonial. The structural steel could have been fabricated entirely from the specifications and drawings furnished by the Engineers without the shop drawings. There were minimum computations required to determine stress, camber or other details necessary to arrive at the proper design and construction of the steel to be used in project 614. The major calculations required of Colonial involved the determination of the size and number of components of the fifteen girders. These calculations could be and were accomplished by referring to a Standard ASC Manual which every steel fabricator necessarily possessed. The ASC Manual shows the lo-

cation of breaks and joints in a 110 foot girder as well as the size of the holes and where the steel plates would be inserted to join the pieces of steel composing the girder. The ASC Manual also correctly computes and states the exact dimensions of every steel plate, every bolt, and every expansion joint. Little, if any, discretion was vested in Colonial as to the fabrication of the structural steel as the design and computations required were derived from the drawings of the Engineers and the ASC Manual. Thus, the Court concludes that Colonial was merely a materialsman in connection with the work on project 614.

8. On August 23, 1963, Colonial and Miller confirmed a prior verbal contract by the terms of which Miller was to supply the structural steel, other than the anchor bolts, for project 614. Miller was required to fabricate the steel according to the shop drawings supplied by Colonial, ship by rail part of the structural steel, including the fifteen girders, to the nearest rail siding to the job site, pay the freight charges incurred, and otherwise haul the remainder of the steel to the job site. Miller agreed to fabricate and deliver the steel for the price of $106,000.00. At the time Miller entered into this contract with Colonial, it was not informed of the required delivery dates of the steel. As Miller assumed no more responsibility than Colonial as to fabricating the steel, the Court concludes that Miller was a materialman in connection with the work on project 614.

9. In November, 1963, the fifteen steel girders had been fabricated by Miller and were ready for shipment. On or about November 25, 1963, several of the girders were loaded on railroad cars by Miller. However, before they were shipped, Colonial requested that the girders be unloaded, which Miller did, because Colonial was unable to find any-

one to unload them at the rail siding for a reasonable price. At this time, Colonial agreed to pay Miller $3,250.00, in addition to the agreed price under the contract of August 23, 1963, for delivery of the fifteen girders by Miller to the job site from Miller's plant located in Salisbury, North Carolina. To deliver the girders as agreed, Miller undertook to build a special steerable unit. The construction of this unit began on or about November 27, 1963.

10. Miller hauled the first girder on his steerable unit on or about December 5, 1963, to the job site. The girder was delivered to the job site, but only after the steerable unit was pulled from a ditch located five to ten miles from the job site by equipment of Troitino. The second girder was hauled on or about December 16, 1963. Approximately ten miles from the job site, the steerable unit bearing the second girder was detached from the tractor unit and left beside the road as the roads to the job site were impassable due to snow. On January 10, 1964, Miller delivered a shipment of miscellaneous steel to the job site, and on the return trip, the second girder was unloaded from the steerable unit left beside the road. The steerable unit was brought back to Miller's plant in Salisbury, North Carolina.

11. On January 9, 1964, Miller and Colonial confirmed a prior oral contract by the terms of which Miller would ship twelve of the remaining thirteen girders to the rail siding at Fremont, Virginia, which is located approximately twenty miles from the job site of project 614. At the rail siding, Colonial would unload the girders and load them on the steerable unit of Miller who would deliver them to the job site. It was agreed that Colonial would pay Miller $3,250.00 for delivery to the job site. The Court finds that this agreement of January 9, 1964, surplanted the agreement

made in November, 1963, (Para. 9 herein) and supplemented the contract of August 23, 1963, in regard to the delivery of the girders only.

12. On January 9, 1964, and January 14, 1964, Miller shipped the twelve girders to the rail siding at Fremont, Virginia. Between January 14, 1964, and January 30, 1964, Colonial unloaded the girders to areas at and near the rail siding with a derrick rented from the railroad and a crane rented from Troitino. Prior to unloading the girders, Colonial requested Miller to have equipment available in order that Miller could deliver the twelve girders to the job site. However, Miller failed to comply with the request. Both Colonial and Miller knew at this time that the girders were needed immediately by Troitino in the construction work at project 614. The Court finds that by failing to have equipment available at the rail siding at Fremont, Virginia, when requested by Colonial, Miller breached the contract of January 9, 1964, with Colonial, and no reasonable excuse existed to alleviate Miller of its duty to comply with the contract.

13. On January 30, 1964, Colonial withdrew all of its employees and equipment from the rail siding and informed Troitino that it was unable to deliver the twelve girders to the job site until the roads were made accessible for Colonial's equipment to get to the job site under their own power. Troitino informed Colonial on February 13, 1964, that by February 17, 1964, it would proceed to obtain delivery of the girders by another source. Thereafter, on February 17, 1964, Troitino contracted with Metler Crane and Erection Service, Inc., hereinafter referred to as Metler, to deliver the girders to the job site from the rail siding for the price of $12,000.00, which the Court finds to be reasonable. Metler started moving the girders to the job site on February 26,

1964, and finished twelve days later. Metler also delivered to the job site the girder which had been shipped on December 16, 1963, by Miller and left beside the road on January 10, 1964. By failing to deliver the girders to the job site, Colonial breached the contract of September 11, 1962, with Troitino.

14. On February 27, 1964, Miller brought the last girder from Salisbury, North Carolina, on the steerable unit to within approximately seven miles of the job site. At this point, the girder was turned over to Metler who delivered it to the job site. At this time, Miller was ready to deliver the girders from the rail siding to the job site, but due to his failure as well as Colonial to deliver in January, 1964, Troitino properly contracted with Metler to deliver the girders.

15. The last structural steel for project 614 was delivered to the job site on or about May 29, 1964. On June 30, 1964, Miller notified Troitino and Travelers Indemnity Company in writing that $18,914.46 was due Miller for work and materials provided in the construction of the bridge at project 614.

16. There is no evidence that Miller had a direct or implied contract with Troitino.

17. By the terms of the contract of August 23, 1963, Miller was entitled to the sum of $106,000.00 from Colonial. The sum of $3,250.00 was added to this amount by the contract of January 9, 1964. Miller has been paid $90,-335.54; therefore, $18,914.46 is alleged to be due to Miller by Colonial. By failing to deliver the girders to the job site and due to other damages incurred by Troitino and Colonial because of the failure to deliver the girders, Miller is entitled to recover nothing of Troitino, Colonial, or Travelers Indemnity Company.

Discussion

This action is brought to recover the balance owed to Miller by Colonial for the fabrication and delivery of the structural steel used by Troitino in the construction of the bridge at project 614. 40 U.S.C.A. § 270a, et seq., commonly known as the Miller Act, provides that in the construction of structures for or on behalf of the United States, the contractor must provide a performance and payment bond. Troitino as the prime contractor contracted with Travelers Indemnity Company to provide the required bond in connection with the construction work at project 614. 40 U.S.C.A. § 270b(a) provides that materialman and laborers may recover on the payment bond monies due them for work and materials used in construction and for which all or part of the payments have not been made. 40 U.S.C.A. § 270b(a), in part, provides:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title * * * shall have the right to sue on such payment bond for the amount, or the balance thereof * * * *Provided, however,* that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made * * * ."

As the Court finds that Miller had no contractual rela-

tionship with Troitino, implied or direct, it must be determined that Colonial was a subcontractor within the meaning of the Miller Act in order for Miller to prevail and recover on the payment bond. *MacEvoy* v. *United States,* 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163 (1944). There is no controversy over the fact that Miller gave the required ninety day notice, and the Court so finds.

The Supreme Court of the United States in *MacEvoy* v. *United States,* 322 U.S. 102, 108, 109, 110, stated the definition of a subcontractor under the Miller Act as follows:

> "* * * In a broad, generic sense a subcontractor includes anyone who has a contract to furnish labor or material to the prime contractor. * * * But under the more technical meaning, as established by usage in the building trades, a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen."

> "* * * The fact that subcontractors were so consistently distinguished from materialmen and laborers in the course of the formation of the Act is persuasive evidence that the word 'subcontractor' was used in the proviso of § 2 (a) in its technical sense so as to exclude materialmen and laborers."

In the *MacEvoy* case, MacEvoy contracted with the United States to build several dwelling units. MacEvoy purchased building materials from J. M. Miller and Company who in turn purchased the materials from Tompkins. J. H. Miller and Company failed to pay Tompkins who brought suit to recover the amount on the payment bond.

The Supreme Court of the United States held that Tompkins could not maintain an action against MacEvoy because J. H. Miller and Company was only a materialman. The Supreme Court stated that Tompkins made no allegation that Miller "agreed to perform or did perform any part of the work on the construction project." At least the inference is from this statement that work at the job site to incorporate materials supplied into the structure under construction is an element to be considered in determining whether a supplier of materials is a "subcontractor." This inference is substantiated by a review of the judicial history of the *MacEvoy* case. The suit was instituted initially in the District Court in New Jersey. *United States* v. *Clifford F. MacEvoy Co.*, 49 F. Supp. 81 (D.C. N.J. 1943). MacEvoy and J. H. Miller filed a motion to dismiss the complaint of Tompkins. In allowing the motion to dismiss, the District Court found that J. H. Miller was not a subcontractor and that Tompkins could not maintain an action against MacEvoy under the terms of the Miller Act. In determining whether J. H. Miller was a materialman, the District Court found that a materialman was one who supplied materials only; whereas a subcontractor is one who supplies materials and labor and incorporates the materials into the structure under contruction. On appeal, the Circuit Court reversed, holding that materialman to a materialman who had a contract with the prime contractor was entitled to sue under the Miller Act. *United States* v. *Clifford F. MacEvoy*, 3 Cir., 137 F. 2d 565 (1943). The Circuit Court stated that the word "subcontractor" as used in the proviso of the Miller Act, 40 U.S.C.A. § 270b (a), should be given a broad, general denotation, rather than narrow and technical. However, the Supreme Court stated that the term "subcontractor" is to be given a technical meaning, and reversed the Circuit Court, thus affirming the District Court. *MacEvoy*

v. *United States, supra.* Therefore, the Court is of the opinion that the definition of a subcontractor as given by the District Court was necessarily approved by the Supreme Court.

In the case at bar, by the terms of its contract of September 11, 1962, with Troitino, Colonial was not required to perform any work at the job site at project 614. Colonial was only required to deliver the steel to the job site where it would be unloaded by Troitino.

Miller contends that a subcontractor within the meaning of the Miller Act is not required to perform any work at the job site. In support, Miller cites *U. S.* v. *Monaco and Son, Inc.*, 222 F. Supp. 175 (D.C. Md. 1963), reversed 336 F. 2d 636 (1964). The *Monaco* case was reversed upon grounds other than those for which Miller cites it. However, in the *Monaco* case, the supplier did send supervisory personnel to the job site to over see the installation of the system. Even though the supplier did not provide the actual gross labor for installation, its supervisory personnel were required for proper installation. This fact, in the opinion of the Court, particularly distinguishes the *Monaco* case from the case at bar. There are a number of cases holding that job site work is not necessary to qualify as a "subcontractor" under the Miller Act. *United States* v. *John A. Johnson & Sons,* 137 F. Supp. 562 (W. D. Pa. 1955); *Basich Bros. Const. Co.* v. *United States,* 9 Cir., 159 F. 2d 182 (1946); *United States* v. *MSI Corporation,* 2 Cir:. 350 F. 2d 285 (1965). Nevertheless, the Court is of the opinion that these cases should be accorded little weight in view of the judicial history of the *MacEvoy* case. The Miller Act must be liberally construed, but with proper and due respect for the courts in the above cited cases, the Court is of the opinion

that their construction of the Miller Act is beyond the bounds limited by the Supreme Court in the *MacEvoy* case.

The only work, other than delivery and actual fabrication, required of Colonial was the preparation of shop drawings for fabrication of the structural steel. These drawings were prepared from the specifications and design drawings of the Engineers, and the shop drawings were solely for the benefit of the shop personnel of Colonial. The evidence shows that the shop drawings were not actually necessary and the steel could have been fabricated from the information supplied by the Engineers. Colonial had little, if any, discretion as to the placement of holes in the steel, and little computation was required to determine camber and stress of each piece. The necessary computations as to the location of joints, size of the holes, and the dimensions of steel plates, bolts and expanson joints in the 110 foot girders could be obtained and were obtained from the Standard ASC Manual. Thus, Colonial needed only to follow the specifications of the Engineers and refer to the Standard ASC Manual to fabricate the steel for project 614.

While not determinative of the relationship, it is evident that Troitino treated Colonial throughout as a material supplier and not a subcontractor. In the four subcontracts let by Troitino, there was a provision requiring the subcontractor to reimburse Troitino a proportionate part of the premium for the performance bond on project 614; however, the contract between Colonial and Troitino contained no such provision. The prime contract required that all subcontracts let by Troitino must be reported to the Engineers with information as to the identity and address of the subcontractor, together with a description of the work subcontracted. There is no evidence that Troitino submitted

this information to the Engineers concerning Colonial as it did with the four subcontractors discussed in Paragraph Five of the Findings of Fact. These four subcontracts were expressly approved by the Engineers, but no express approval was given to the contract with Colonial. Colonial submitted no payroll records to the Engineers nor was there included in its contract with Troitino Clause 21, a clause regarding Nondiscrimination in Employment, or the clauses set forth in Standard Form 19A as required by the prime contract in all subcontracts. Finally, the contract between Colonial and Troitino was oral and confirmed by letter. The four subcontracts previously discussed were on forms approved by the Engineers.

Considering all the evidence and the inferences to be drawn therefrom, the Court concludes that Colonial was "not one who performs for or takes from the prime contractor a specific part of the labor or material requirements of the original contract," and therefore, not a subcontractor within the meaning of the Miller Act. Thus, Colonial being only a materialman as distinguished from a subcontractor, Miller is not entitled to maintain an action under the Miller Act. 40 U.S.C.A. § 270b(a), *MacEvoy v. United States, supra.*

Miller contends that even though Colonial is a materialman, it should be able to pursue relief under common law theory of contract because the Court has pendent jurisdiction over the Court. The Court is in agreement with this contention. There is no question that the case could not have been brought originally in federal court other than under the Miller Act as diversity of citizenship is lacking between the parties. 28 U.S.C.A. § 1332. In *Brown & Root, Inc.* v. *Gifford-Hill Company*, 5 Cir., 319 F. 2d 65 (1963),

the court, having determined that the plaintiff had no cause of action under the Miller Act as a subcontractor relationship was not present, stated at pages 67 and 68:

> "* * * Federal jurisdiction originally was based on the presence of a federal question, namely, the Miller Act claim. Both Brown & Root and Gifford-Hill are Texas corporate citizens and there is no diversity of citizenship. On determination by the trial court that the Miller Act claim was ill-founded, it is argued that the action should have been dismissed. The question is controlled by *Hurn* v. *Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148, and the cases which follow it. Under the teachings of these authorities, we hold that the court was vested with pendent jurisdiction, and could determine the contract action. Gifford-Hill asserted a single cause of action against Brown & Root, to recover for the gravel furnished. Recovery sought under terms of a federal statutory cause of action, or under a common law theory of contract breach, are no more than different avenues seeking to reach the same end. They constitute alternative theories of recovery for a single alleged wrong. The Miller Act claim was not frivolous or unsubstantial. It was asserted and prosecuted in good faith. Thus, the court not only might determine that claim, but others arising from essentially the same facts in seeking recovery from some of the same parties for the same materials. *Strachman* v. *Palmer* (1 Cir. 1949), 177 F. 2d 427, and cases cited there; 1 Cyclopedia of Federal Procedure § 2.238 (3rd ed. 1951); 1 Barron and Holtzoff, Federal Practice and Procedure § 23 (1960)."

In the case at bar, Miller is only seeking to recover the

balance owed for the fabrication of the steel. There is only one cause of action, but Miller has "different avenues seeking to reach the same end." The claim under the Miller Act was made in good faith and not unsubstantial. Even though Colonial was not a subcontractor and the Miller Act claim fails, Miller is entitled to have this Court consider appropriate relief under common law theories of breach of contract.

Troitino and Colonial contend that the Court has no pendent jurisdiction and that the case of *United States* v. *Continental Casualty Company*, 195 F. Supp. 177 (D. C. N. J. 1961), is controlling. In the *Continental* case, the District Court, after finding that a supplier to a subcontractor did not give the required notice under the Miller Act, granted summary judgment in behalf of the defendants, and stated that the court did not have pendent jurisdiction. The court stated that the "Miller Act gives limited jurisdiction and the jurisdictional requirements must be fully met." Thus it appears that *Brown & Root* v. *Gifford-Hill Company*, *supra*, and *United States* v. *Continental Casualty Company*, *supra*, are in conflict, but the Court is of the opinion that the holding of the former case is supported by better reasoning and policy.

It is clear that in determining Miller's claims under the common law, this Court must apply the law of North Carolina. Miller contends that if its claim fails under the Miller Act, then it is entitled to recover from Troitino on the basis of *quantum meriut*. Miller contends that Colonial withdrew from its contract with Troitino on January 30, 1964; therefore, when Troitino accepted and used the steel supplied by Miller, an implied contract was created, and Miller is entitled to recover the reasonable value of the steel. The Court

cannot agree with this contention. Troitino contracted with Colonial for fabrication and delivery of the steel and at all times held Colonial responsible for these obligations. The only connections that Troitino had with Miller concerned inquiries as to the progress of fabrication and when the steel would be delivered to the job site. Troitino never promised payment for the steel or entered into an agreement with Miller.

The facts in the case at bar are similar to those in *Ranlo Supply Company* v. *Clark,* 247 N. C. 762, 102 S. E. 2d 257 (1958). In the *Ranlo* case, the plaintiff sold building materials to a contractor who had contracted with the defendants' son to build a house on a lot owned by the defendants. The plaintiff dealt only with the contractor and no one else. The house was not completed, and the plaintiff was not paid. Thereafter, the plaintiff brought suit to collect from the defendants on the theory of implied contract. The Supreme Court of North Carolina held that the plaintiff had no cause of action against the defendants. The rule that the Supreme Court followed is best stated in *Vetco Concrete Company* v. *Troy Lumber Company,* 256 N. C. 709, 124 S.E. 2d 905, 908 (1962), wherein it was held:

> " ' (I)t is a well-recognized principle that there can be no implied contract where there is an express contract between the parties in reference to the same subject-matter.' "

> "It is stated in 12 Am. Jur., Contracts, Section 7, page 505: 'There cannot be an express and implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can

be implied where there is an express one existing,' * * *"

" 'The same rule has been applied to benefits conferred under a special contract with a third person. When there is a contract between two persons for the furnishing of services or goods to a third, the latter is not liable on an implied contract simply because he has received such services or goods.' "

Miller contracted with Colonial to fabricate and provide the structural steel for project 614; therefore, Miller has no cause of action against Troitino under *quantum meruit* covering the same subject-matter.

Miller further contends that if there is no cause of action under the Miller Act or against Troitino, then it is entitled to recover from Colonial for breach of contract. However, Colonial contends that Miller is not entitled to relief against it because Miller failed to ask for such relief in its complaint. Rule 54(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., in part, provides:

"* * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*" (Emphasis supplied)

Therefore, it is clear that the Court can consider Miller's claim against Colonial and whether Colonial breached its contract with Miller.

The contract of August 23, 1963, between Colonial and Miller required the latter to fabricate all the structural steel, except the anchor bolts, for project 614. Miller was also

to transport part of the steel to the job site, and the rest, including the fifteen girders, to the nearest rail siding to the job site with Miller responsible for the freight charges. Colonial agreed to pay Miller $106,000.00 under this agreement. Further, under this agreement, Colonial was responsible for delivery to the job site of the steel shipped by rail.

Thereafter, in late November, 1963, Miller loaded several girders on railroad cars for shipment. It is readily apparent that delivery of the fifteen girders to the job site is the thorn of contention between the parties in this case. Colonial requested that the girders be unloaded as it was unable to obtain reasonable delivery service from the rail siding to the job site. It was then agreed between Miller and Colonial that Miller would deliver the girders to the job site from its plant in Salisbury, North Carolina. Miller planned to build a special steerable unit upon which the girders would be carried. Colonial agreed to pay Miller an additional $3,250.00 for the delivery service. The Court finds that at this time both Colonial and Miller were fully aware of the immediate need of Troitino for the girders in order that construction could progress.

In December, 1963, Miller hauled two girders, the first of which reached the job site, but with the aid of Troitino who pulled the steerable unit out of a ditch approximately five miles from the job site. The second girder was left on the steerable unit beside the road approximately ten miles from the job site because the road as contended by Miller was impassable due to snow.

Realizing the immediate need of Troitino for the girders and the time required to haul them from Salisbury, North Carolina, Miller and Colonial agreed on January 9, 1964,

to ship twelve of the remaining thirteen girders by rail to the rail siding at Fremont, Virginia, located approximately twenty miles from the job site. Miller agreed to pay the freight charges and to use the steerable unit to deliver the girders to the job site from the rail siding. Colonial agreed to unload the girders from the railroad cars to the steerable unit and to pay Miller $3,250.00 for the delivery to the job site.

Subsequently on January 10 and 14, 1964, Miller shipped the twelve girders to the rail siding. However, when Colonial requested Miller to have equipment available for loading at the rail siding, Miller refused. Colonial then unloaded the girders to areas at and near the rail siding. The Court finds that Miller breached its contract with Colonial by not having his equipment at the rail siding when requested.

Miller contends that due to bad weather conditions that it could not have made delivery to the job site from the rail siding. The duty of a party to a contract is found in the obligations assumed by him, and the failure to comply with the duty consitutes a breach of contract. The burden of proof to show excuse of nonperformance based on some valid reason is upon the breaching party. *Cechrest* v. *Forest Furniture Company*, 264 N. C. 216, 141 S. E. 2d 292 (1965). Thus, Miller must show that some reasonable excuse existed for his nonperformance. The Court is of the opinion that Miller failed to carry the burden of proof in this respect. Evidence shows that the weather in the area of the job site was not unusually severe. The designated routes to the job site were maintained by the Virginia Highway Department, and were kept clear of snow. The Court is of the opinion that Miller could have taken his steerable unit to the rail siding without serious difficulty. This is confirmed somewhat

by the fact that on January 10, 1964, a load of miscellaneous steel was delivered to the job site, and on the return trip, Miller's employee brought back the steerable unit which had been left beside the road in December, 1963. At this time, Miller knew that he was obligated to make delivery from the rail siding, and could have taken the steerable unit to the rail siding rather than return it to Salisbury, North Carolina.

After Miller refused to have equipment at the rail siding when requested, Colonial informed Troitino by letters on January 30, 1964 (Troitino Exhibits 1 and 4) that it would not attempt to deliver the girders to the job site. The reason given was that the designated routes to the job site were not sufficient to allow travel of a truck carrying a 110 foot girder. These letters refute Miller's contention that the routes were impassable by reason of snow as no mention of weather conditions were made in the letters. In fact, it is stated in one of the letters that the girders "are designed too long for truck delivery." Thereafter, Troitino contracted with Metler to deliver the girders from the rail siding to the job site. Metler delivered as required. The very fact that Metler made delivery shows as incorrect the contention of Colonial that the designated routes would not allow delivery of the girders. It is apparent to the Court that both Miller and Colonial assumed responsibilities which they were not equipped to meet, namely, delivery of the girders to the job site.

On February 27, 1964, Miller went to the rail siding with his steerable unit and was purportedly ready to make delivery. However, Metler had already been engaged to do the work. The Court is of the opinion that even if Miller were ready to perform his obligations to Colonial on February 27, 1964, such does not excuse his prior nonperformance. There is abundant evidence to indicate that Troitino needed the

structural steel immediately and that he had informed both Colonial and Miller of this fact. When Colonial and Miller entered into their agreement on January 9, 1964, both were aware of the necessity for immediate delivery. Therefore, the Court finds that by failing to have equipment available at the rail siding in January, 1964, and knowing immediate performance was necessary, Miller breached its contract with Colonial.

Miller in its complaint seeks to recover $18,914.46 which is the differnece between $109,250.00 owed and $90,335.54 paid to Miller. Of the amount sought to be recovered, $3,250.00 is to be deducted as this is the amount Colonial agreed to pay Miller for delivery of the twelve girders to the job site from the rail siding under the contract of January 9, 1964. This was not done by Miller. The remaining balance is $15,664.46.

Colonial contends that $12,000.00 should be deducted from the balance owed to Miller. This amount represents that sum paid to Metler by Troitino for delivery of the twelve girders to the job site. Troitino backcharged Colonial this amount, and Colonial in turn backcharged Miller. A party who is injured by the breach of a contract is required to minimize his loss, and the expense which the injured party is required to incur in minimizing his loss is recoverable from the defaulting party. *Harris and Harris Construction Company* v. *Crain and Denbo, Inc.*, 256 N. C. 110, 123 S. E. 2d 590 (1962). The Court finds that the $12,000.00 charged by Metler was reasonable, and Troitino properly engaged his services. After Miller failed to have equipment available at the rail siding, Colonial refused to engage anyone else to perform the work. However, even though Colonial failed to minimize the damages, Miller has the burden of showing how

Colonial could have minimized its damages. *Harris and Harris Construction Company* v. *Crain and Denbo, Inc., supra.* Miller failed to carry this burden, and there is no evidence that Colonial could have obtained anyone to deliver the girders for less than $12,000.00. Therefore, Colonial is entitled to have $12,000.00 deducted from any amount recovered by Miller.

Colonial further contends that the amount of $3,700.00 should be deducted from the balance owed to Miller. This amount represents a portion of the amount of liquidated damages backcharged by Troitino to Colonial. It is contended that liquidated damages were charged by the Engineers to Troitino because of the late delivery of the steel. There is evidence that no liquated damages were charged because of the late delivery of steel. (Colonial Exhibits 2 and 3). Other evidence (Troitino Exhibit 12) indicates that the Engineers backcharged Troitino $5,400.00 in liquidated damages for the period of September 11, 1964, through November 3, 1964. Also, evidence indicates that the final construction work on project 614 could not be completed until the steel, especially the girders, were delivered and erected. The Engineers did not charge Troitino liquidated damages for the period the steel was not delivered, but only for the delay in the final completion of the bridge. However, the final construction work was delayed by the late delivery of the steel; therefore, in effect, Troitino was charged liquidated damages for the late delivery of the steel. In the opinion of the Court, Troitino properly backcharged Colonial, and Colonial properly backcharged Miller. The amount of $3,700.00 is to be deducted from the balance owed Miller.

For reasons hereinbefore given, Miller is entitled to recover nothing of Troitino, Colonial and Travelers Indemnity Company.

Conclusions of Law

1. Colonial Steel and Iron Company is not a subcontractor within the meaning of the Miller Act, 40 U.S.C.A. § 270a-§ 270d; therefore, the plaintiff, Miller Equipment Company, is not entitled to recover on the payment bond executed by Travelers Indemnity Company for Troitino and Brown, Inc., in connection with the construction of a bridge on Virginia Highway No. 614 across the Cranesnest River in Dickenson County, Virginia.

2. The Court has pendent jurisdiction of the parties in this action and subject matter.

3. The motions to dismiss by the defendants, Colonial Steel and Iron Company and Troitino and Brown, Inc., are denied.

4. The plaintiff, Miller Equipment Company, has no contract, direct or implied, with Troitino and Brown, Inc., and is entitled to recover nothing of Troitino and Brown, Inc.

5. The plaintiff, Miller Equipment Company, breached its contract with the defendant, Colonial Steel and Iron Company, and is entitled to recover nothing of Colonial Steel and Iron Company.

6. By breach of the contract of August 23, 1963, supplemented by the agreement of January 9, 1964, the plaintiff, Miller Equipment Company, caused the defendant, Troitino and Brown, Inc., to pay $12,000.00 to Metler Crane and

Erection Service, and to be charged liquidated damages of $3,700.00 by the United States Corps of Engineers. These amounts are deducted from the amount which Miller Equipment Company is seeking to recover in this cause.

7. The plaintiff, Miller Equipment Company, shall bear the cost of this action.

Counsel for the defendants shall prepare and submit to the Court an appropriate judgment.

EUGENE A. GORDON

United States District Judge

September 23, 1966

OPINION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,123.

Miller Equipment Company,
Appellant,

versus

Colonial Steel and Iron Company, Troitino and Brown, Inc., Travelers Indemnity Company, Hartford, Connecticut, and U.S. Army Corps of Engineers,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT SALISBURY. EUGENE A. GORDON, DISTRICT JUDGE.

(Argued May 3, 1967. Decided July 20, 1967.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

Robert P. Buford (Peter O. Ward, Jr., and Graham M. Carlton, and Hunton, Williams, Gay, Powell & Gibson on brief) for Appellant; Max Busby (Nelson Woodson, and Woodson, Hudson & Busby on brief) for Appellee Colonial Steel and Iron Company, and E. Glenn Kelly (Harold K. Bennett on brief) for Appellees Troitino and Brown, Inc., and Travelers Indemnity Company.

ALBERT V. BRYAN, Circuit Judge:

Recovery by Miller Equipment Company of the balance of the amount for which it agreed with Colonial Steel & Iron Company to fabricate and deliver structural steel to be incorporated in a Federal bridge project in Virginia was defeated by the District Court's finding that Miller had defaulted in performance of the contract. The finding we believe clearly was not warranted by the facts, which are scarcely disputable. The ensuing judgment must be reversed on this appeal of Miller.

With a jury waived, the claim was presented to the Court first under the Miller Act, 40 USC270a-270d, and then as a pendent suit. The central issue, however, was embodied in the finding just posited. Hence we go at once to that question. A chronicle of the dealings between the parties will best reveal the point of the breach.

1. On September 4, 1962 Troitino and Brown, Inc. entered into a contract with the United States Corps of Engineers to build a concrete and steel bridge across the Cranes Nest River in Dickenson County, Virginia, known as project 614, at a basic price of $762,470.15 and with a completion date of October 13, 1963. In accordance with the Miller Act Troitino gave a payment and performance bond with Travelers Indemnity Company as surety.

2. The portion of this prime contract with which the present litigation is concerned was the furnishing of the necessary structural steel, especially 15 girders.

3. On September 11, 1962 Colonial agreed with Troitino to supply the latter with the required structural steel at a

price of $115,000.00 with delivery at the site of the project on or before July 15, 1963 and with Troitino unloading it there.

4. The 15 girders were each approximately 110 feet in length, weighing from 17 to 20 tons apiece.

5. On August 23, 1963 Colonial and Miller, the plaintiff-appellant, concluded an agreement by which Miller was obligated to supply the structural steel; to fabricate it according to shop drawings furnished by Colonial; to ship the 15 girders by rail from Miller's plant at Salisbury, North Carolina to Fremont, Virginia, the nearest rail siding to the job; to pay the freight thereon; and to haul the remainder of the steel to the job. The overall price was $106,000.00, but no delivery dates were fixed.

6. On November 19, 1963 the 15 steel girders were readied by Miller for shipment and some were loaded on the railroad cars at Salisbury, but on November 25, 1963, Colonial directed Miller to unload them. The direction was given, the District Judge found, "because Colonial was unable to find anyone to unload them at the rail siding for a reasonable price". The uncontradicted testimony discloses that Colonial had obtained a price of $9,000.00 from Metler Crane and Erection Service, Inc. and $8,000.00 from another party, but rejected them as too high.

7. Thereupon Colonial agreed to pay Miller, above the original contract price of August 23, 1963, the sum of $3,250.00 to deliver the 15 girders from Miller's plant to the bridge site by means of a special steerable unit to be built by Miller.

8. On December 5, 1963 with this special unit Miller

hauled the first girder to the construction point.

9. On December 16, 1963 the second girder was likewise placed in transit, but when about 10 miles from the job, the unit with the girder was left beside the road because snow had made the road impassable. On January 10, 1964 this second girder was removed from the unit, put roadside and the unit returned to Miller's plant in Salisbury, about 200 miles away.

10. Then on January 9, 1964 Miller and Colonial agreed: that Miller would ship 12 of the remaining 13 girders by rail to Fremont, some 20 miles from the job site; that the means of their carriage from Fremont to the job site would be the steerable unit; that Colonial would unload the girders at Fremont and *place them on Miller's unit;* that the price would be $3,250.00; and that the new agreement superseded the similar one of November 1963.

11. On January 9 and 14, 1964 Miller shipped the 12 girders to Fremont, and between January 14 and 30, 1964 Colonial unloaded them along the rail siding.

12. Miller did not have the steerable unit at Fremont to receive the 12 girders, and *in this the District Court found that Miller had inexcusably breached its contract of January 9, 1964 with Colonial.*

13. On January 30, 1964 Colonial advised Troitino that it was unable to deliver the 12 girders until the roads were made passable for Colonial's equipment to reach the job site; on February 13, 1964 Troitino notified Colonial that it would procure delivery of the girders through other means unless Colonial delivered them before February 17, 1964; on the latter date Troitino contracted with Metler to carry the

girders from the Fremont siding to the job for the price of $12,000.00; and beginning on February 26th, Metler completed the undertaking 12 days later. The Court found this conduct of Colonial to be a breach of its contract with Troitino.

14. On February 27, 1964 Miller transported the last or 15th girder on the steerable unit from its Salisbury plant to a spot within 7 miles of the job, where it was handed over to Metler who took it the rest of the way.

In our view, a total breach of the contract between Colonial and Miller occurred when Colonial, on or about November 25, 1963, directed Miller to remove the girders from the railroad cars. Para. 6 supra. No acceptable excuse or mitigating explanation is offered. Indeed, Colonial admitted in oral argument here that had Colonial then fulfilled its contractual obligation to receive the girders at the rail head there would now be no dispute. The agreements subsequent to Colonial's breach were separate and distinct from the original contract; they were made merely to ease Colonial's difficulty.

The District Court erred, too, we think, in its finding that Miller abrogated the agreement of January 9, 1964. Para. 12 supra. The contract stipulated that the girders, when discharged at the railroad siding in Fremont, were to be placed by Colonial, and hauled by Miller, upon the steerable unit. The agreement was necessitated by the snow blockage of those roads which the Virginia Department of Highways specified for the transportation. Although punctually shipped, the girders arrived while the roads were still impassable by Miller's unit. All the while Miller kept in touch with the Department. It hauled the 15th girder with this

rig from Salisbury to the job site the next day, February 27, 1964, after a favorable report was given by the Department. For this purpose the unit had to travel almost 200 miles. All of this delay, it was conceded in argument, was impliedly contemplated in the agreement's stipulation that the movement should be made by the steerable unit.

During the delay Colonial deposited the girders at two inacessible locations along the siding. Para. 11 supra. It had provided no means to lift the girders onto Miller's unit even had this vehicle been available. Apparently, Colonial discharged the girders from the cars, without waiting for Miller's equipment, merely to save payment of demurrage to the railroad. By the time Miller could comply with the agreement of January 9, 1964, Colonial had withdrawn from its undertaking with Troitino, and the latter had itself taken over the movement of the girders to the job. No fault of Miller's contributed to Colonial's abandonment of the undertaking.

Miller sued for $18,914.46, made up as follows:

Amount stipulated in contract of August 23, 1963	$106,000.00
Amount of January 9, 1964 contract	3,250.00
	$109,250.00
Less amounts paid Miller	90,335.54
Balance	$ 18,914.46

Against this balance the District Judge charged Miller with the following sums as damages suffered or incurred by Colonial allegedly as a result of Miller's omission to receive the 12 girders on arrival at Fremont:

Cost of delivering girders by Metler	$ 12,000.00
Proportion of the total liquidated damages charged by U. S. Engineers to Troitino for delay in completion of the contract, back-charged by Troitino to Colonial and allowed Colonial against Miller	3,700.00
Amount of January 9, 1964 contract.....	3,250.00[1]
	$ 18,950.00

As the deductions exceeded the claim, no recovery at all was permitted Miller.

To repeat, we think Miller breached none of its agreements, but that Colonial was the violator. As we think, too, that the amounts for which Miller sues represent reasonable damages for Colonial's defaults, Miller should recover the claimed sum of $18,914.46. The next question is under what theory of law—Miller Act or common law breach of contract—the recovery should be effectuated. The point is significant because there would be no liability upon the Travelers as surety on the prime contract bond if it is not a Miller Act case. Moreover, a substantial claim under the Miller Act, for reasons noted below, is necessary if the contract claim is presently to be entertained.

Under the Act[2], 40 USC 270a-270d, the bond protects only subcontractors and their sub-subcontractors, laborers

[1]While now academic, it is conceded by all parties that the charge of $3,250.00 was a duplication, because this item was included in the deduction of $12,000.00.

and materialmen. In MacEvoy v. United States, 322 US 102, 107, 108 (1944) the Court so declared and defined "subcontractor" as follows:

> "The proviso of § 2(a) [40 USC 270b(a)], which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act".
>
> "But under the more technical meaning, as established by usage in the building trades, a subcontractor is one

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[2] "§ 270a. Bonds of contractors for public building or works; waiver of bonds covering contract performed in foreign country

"(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor' . . . ."

"§ 270b. Same; rights of persons furnishing labor or material

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond . . . ."

who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen. . . ."

The District Court concluded that Colonial was not a subcontractor of Troitino, but simply a supplier of materials, thus excluding Miller from the coverage of the bond. The following subordinate findings account for the opinion of the District Court that Colonial was no more than a materialman:

"5. . . . The prime contract in paragraph GC-6, Subcontractor, required that each subcontract contain Clause 21, a clause providing for Nondiscrimination in Employment, and further required all subcontracts to contain all clauses in Standard Form 19-A [setting minimum labor standards]. Each subcontract [of the 4 let to others than Colonial] . . . contained a requirement that the subcontractor reimburse Troitino a proportionate part of the premium for the payment and performance bond executed by Travelers Indemnity.

"6. The sales contract between Colonial and Troitino . . . was neither submitted to nor approved by the Engineers. The contract was neither executed on forms approved by the Engineers nor did it contain Clause 21 or the clauses in Standard Form 19-A as required by the prime contract. The sale contract did not contain any provision for reimbursement by Colonial to Troitino of a proportionate part of the premium for the payment and performance bond executed by Travelers Indemnity Company, and Colonial was never required to contribute any amount toward the premium.

> "7. . . . Little, if any, discretion was vested in Colonial as to the fabrication of the structural steel as the design and computations required were derived from the drawings of the Engineers and the ASC Manual. Thus, the Court concludes that Colonial was merely a materialman in connection with the work on project 614."

Our opinion, however, is that despite the form of the written contract between Troitino and Colonial, Colonial in actuality was a subcontractor as envisaged by the Act and *MacEvoy*. Certainly Colonial was no ordinary materialman. The amount due it for successful performance of its contract with Troitino was $115,000.00, more than 15% of the sum due Troitino under the prime contract and 64% of item 20, a fundamental provision of that contract because it was the specification for structural steel. The Troitino-Colonial agreement called not for the mere supply of materials but for the custom fabrication of massive girders and their accessories, key and integral components of the bridge, designed and fabricated to mesh precisely in their final assembly on the job-site. See Travelers Indem. Co. v. United States, 362 F2d 896 (9 Cir. 1966); United States v. MSI Corp., 350 F2d 285 (2 Cir. 1965); compare United States v. Lembke Constr. Co., 370 F2d 293 (10 Cir. 1966). It is of little moment here that Troitino designated the Colonial agreement as a "purchase order" for the steel. Nor is it surprising that Colonial neither contributed to the bond premium nor subscribed to Clause 21 and Standard Form 19-A. Troitino never asked it to do so. We cannot posit Colonial's status as a materialman or subcontractor merely upon Troitino's neglect to enforce its contract with the government, or to require that all subcontractors contribute to the premium.

Although we allow recovery under the Miller Act, we think it meet that the primary liability be Colonial's for breach of contract. Indeed, judgment against Colonial would have been appropriate even had the statutory action failed. Despite the lack of diversity between Miller and Colonial, Miller's claim under the Act would have been a substantial one, not frivolously brought, and since resolution of its contract claim turned on the same proof, the doctrine of pendent jurisdiction would have permitted the case to proceed. United Mine Workers v. Gibbs, 383 US 715 (1966); Rumbaugh v. Winifrede R.R., 331 F2d 530 539-40 (4 Cir. 1964). In this we join the District Court. The law of North Carolina then became applicable, requiring performance by Miller of its contract—made in that State—in order to succeed at all. Vetco Concrete Co. v. Troy Lumber Co., 256 N.C. 709, 124 SE2d 905 (1962); Ranlo Supply Co. v. Clark, 247 N.C. 762, 102 SE2d 257 (1958). Miller did comply with its agreement and would be entitled to judgment against Colonial whether or not we ruled for it under the Act.

The action will be remanded for entry by the District Court of a judgment in favor of Miller Equipment Company for the sum of $18,914.46 with interest thereon at the rate of 6% per annum from February 27, 1964 until paid, together with costs. The judgment will lie primarily against Colonial, whose fault it was that occasioned Miller's loss, and secondarily upon Troitino and Travelers for any deficiency.

Reversed and remanded.